

Message Text

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ACTION L-03

INFO OCT-01 EUR-12 ISO-00 IO-13 AID-05 CEQ-01 CIAE-00

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R 131440Z JUL 76

FM AMEMBASSY OTTAWA

TO SECSTATE WASHDC 441

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E.O. 11652: N/A

TAGS: SENV, CA

SUBJ: ST. MARY'S ICE BOOM

FOR L - ATTN SCOTT GUDGEON

1. THE FOLLOWING PROPOSED JOINT REPLY TO THE IJC ON THE ST. MARY'S ICE BOOM HAS BEEN GIVEN TO US BY EXTAFF FOR TRANSMISSION TO L - SCOTT GUDGEON.

2. BEGIN TEXT: I AM REPLYING FURTHER TO YOUR LETTER OF JANUARY 20 TO THE SSEA CONCERNING THE JURISDICTION OF THE INTERNATIONAL JOINT COMMISSION UNDER ARTICLE III OF THE 1909 BOUNDARY WATERS TREATY WITH RESPECT TO THE CONSTRUCTION AND OPERATION OF AN ICE BOOM BY THE UNITED STATES GOVERNMENT IN THE UNITED STATES WATERS OF THE ST. MARY'S RIVER, AND TO OUR INTERIM REPLY OF JANUARY 30, 1976.

3. CANADIAN GOVERNMENT AUTHORITIES HAVE GIVEN CAREFUL CONSIDERATION TO THE DETAILED EXPLANATION UNDERLYING THE CONCLUSION OF THE MAJORITY OF THE COMMISSION LAST DECEMBER THAT THE GOVERNMENTS SHOULD SUBMIT THE MATTER OF THIS BOOM TO THE COMMISSION TO MAKE A PRELIMINARY
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DETERMINATION AS TO WHETHER JURISDICTION ATTACHES PUR-

SUANT TO ARTICLE III OF THE TREATY. WHILE IN SYMPATHY WITH CERTAIN ELEMENTS OF THE ARGUMENTATION, WE CANNOT CONCUR IN THE CONCLUSION REACHED BY THE MAJORITY OF THE COMMISSION. OUR VIEWS ON THE JURISDICTIONAL ISSUES ARE AS FOLLOWS:

4. IT S A WELL ESTABLISHED PRINCIPLE OF INTERNATIONAL LAW THAT NO STATE MAY BE SUBJECTED TO THE JURISDICTION OF AN INTERNATIONAL ORGANIZATION WITHOUT ITS CONSENT. SUCH CONSENT IS NORMALLY FOUND IN THE INSTRUMENT OR INSTRUMENTS ESTABLISHING THE ORGANIZATION, IN THIS CASE THE BWT. JURISDICTION IS NOT PRESUMED; IT MUST ALWAYS BE SET FORTH CLEARLY IN THE CONSTITUENT INSTRUMENT. CONSISTENT WITH WELL ESTABLISHED PRINCIPLES OF CONSTRUCTION OF AGEEMENTS, RECOGNIZED BY THE COMMISSION IN ITS OPINION IN THE RAINY RIVER IMPROVEMENT COMPANY APPLICATION (DOCKET 1, 1912), WHERE THE DOCUMENT IS REASONABLY CERTAIN AND COMPLETE, IT IS IN ITSELF A SUFFICIENT MANIFESTATION OF THE INTENT OF THE PARTIES TO IT. AS THE COMMISSION STATES, "...AN INTERNATIONAL COMMISSION FINDS ITS AUTHORITY TO ACT IN THE TREATY CREATING IT OR IN SUPPLEMENTAL TREATIES DEFINING ITS POWERS, AND THAT ANY ACTION TAKEN BY IT BEYOND THE TERMS OF THE TREATY FAIRLY CONSTRUED, WOULD BE CORAM NON JUDICE AND VOID. IT WOULD BIND NEITHER GOVERNMENT." (ID. OPINION OF THE COMMISSION, P.7). MOREOVER, AN AUTHORITATIVE INTERPRETATION OF THE TREATY WHERE SUCH IS REQUIRED, CAN ONLY BE RENDERED BY THE PARTIES TO IT AND CANNOT BE PRONOUNCED BY THE COMMISSION, WHICH IS A CREATURE OF THE TWO GOVERNMENTS.

5. THE BOUNDARY WATERS TREATY IS SILENT ON THE QUESTION OF THE COMMISSION'S JURISDICTION TO RENDER A PRELIMINARY DECISION REGARDING THE NEED FOR AN APPLICATION IN ANY CASE WHICH, UNDER CERTAIN CONDITIONS, AND UPON APPROPRIATE APPLICATION WOULD COME WITHIN ITS JURISDICTION UNDER THE PROVISIONS OF THE TREATY. ON THE OTHER HAND, THE TREATY IS CLEAR THAT CERTAIN WORKS ENUMERATED IN THE SECOND PARAGRAPH OF ARTICLE III ARE EXPRESSLY RESERVED BY THE TWO GOVERNMENTS FROM THE JURISDICTION OF THE COMMISSION.

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THESE INCLUDE "GOVERNMENTAL WORKS IN BOUNDARY WATERS FOR THE DEEPENING OF CHANNELS, THE CONSTRUCTION OF BREAKWATERS, FOR THE BENEFITS OF COMMERCE AND NAVIGATION, PROVIDED THAT SUCH WORKS ARE WHOLLY ON ITS OWN SIDE OF THE LINE AND DO NOT MATERIALLY AFFECT THE LEVEL OR FLOW OF THE BOUNDARY WATERS ON THE OTHER..." IT SHOULD BE NOTED THAT THIS RESERVATION DOES NOT DEPEND ON AN AGREEMENT BETWEEN THE PARTIES, AS CON-

TEMPLATED IN THE EXCEPTIONS TO THE FIRST PARAGRAPH OF THE ARTICLE.

6. WE ARE UNAWARE OF PRECEDENTS IN THE PRACTICE OF THE COMMISSION, OR OF OTHER ANALOGOUS INTERNATIONAL ORGANIZATION, WHERE A PRELIMINARY OR SPECIAL JURISDICTION HAS BEEN ASSUMED TO DETERMINE WHETHER THE ORGANIZATION IN FACT HAD JURISDICTION OVER A PARTICULAR MATTER, IN THE ABSENCE OF A SPECIFIC PROVISION TO THAT EFFECT IN ITS CONSTITUENT INSTRUMENT, OR A REQUEST OR APPLICATION PROPERLY SUBMITTED TO IT. IT IS SETTLED, HOWEVER, THAT ONCE THE COMMISSION HAS RECEIVED AN APPLICATION FOR AN ORDER OF APPROVAL, IT MAY DETERMINE WHETHER IT HAS JURISDICTION TO CONSIDER THE MATTER. THE COMMISSION'S INITIAL DOCKET, PREVIOUSLY CITED, TURNS ON SUCH A QUESTION.

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7. THIS CLEAR AND UNEQUIVOCAL RESERVATION OF JURISDICTION UNDER ARTICLE III AROSE IN PART FROM CONSERVATISM PREVALENT AT THE TIME OF CONCLUSION OF THE TREATY REGARDING THE PERMISSIBLE POWERS OF THE NEW COMMISSION MECHANISM IN LIGHT OF ITS IMPACT ON IMPORTANT MATTERS WHICH HAD, UNTIL THEN, REMAINED EXCLUSIVELY WITHIN NATIONAL JURISIDCTION. THE WORK OF

THE COMMISSION OVER THIS CENTURY HAS WELL DEMONSTRATED THE WISDOM OF THE CONCLUSION OF THE TREATY AND THE ESTABLISHMENT OF THE COMMISSION. IT HAS FACILITATED EVEN CLOSER BILATERAL COOPERATION OVER THE YEARS IN AREAS OF MUTUAL CONCERN AND INTEREST. NOTWITHSTANDING THIS HISTORY AND THE LUDABLE SPIRIT WHICH MOTIVATED YOUR LETTER, IT REMAINS AXIOMATIC THAT THE EXPRESS PROVISIONS OF THE TREATY CANNOT BE AMENDED BY THE COMMISSION BUT ONLY BY THE GOVERNMENTS THEMSELVES IN ACCORDANCE WITH THEIR RESPECTIVE CONSTITUTIONAL PROCESSES.

8. IT IS EVIDENT THAT BOTH PARTIES RESERVED THEIR RIGHT TO DETERMINE UNILATERALLY WHETHER A PARTICULAR GOVERNMENTAL WORK ON ONE SIDE OF THE BOUNDARY IN BOUNDARY WATERS WILL HAVE A MATERIAL TRANSBOUNDARY EFFECT ON LEVELS AND FLOWS. NONETHELESS, BOTH GOVERNMENTS HAVE COME TO CONSULT LIMITED OFFICIAL USE

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UPON REQUEST WITH RESPECT TO WORKS WHICH MIGHT RAISE AN QUESTION WITH REGARD TO ARTICLE III'S JURISDICTIONAL THRESHOLD ON "MATERIALITY". WHILE THERE HAS YET EMERGED NO PRECISE DEFINITION OF THIS TERM, WHICH IN EARLY DRAFTS OF THE TREATY WAS LINKED TO EFFECTS WHICH WOULD BE PRODUCTIVE OF INJURY TO CITIZENS OF THE OTHER COUNTRY, BOTH GOVERNMENTS FULLY CONCUR IN THE SPIRIT OF COMMISSIONER MIGNAULT'S OPINION IN THE MASSENA WEIR CASE (DOCKET 15, 1918) WHICH YOU QUOTE IN YOUR LETTER. THE COMMISSION'S JURISDICTION IN THAT CASE, WHICH INVOLVED WORKS SOLELY ON ONE SIDE OF THE BOUNDARY, WAS, OF COURSE, FOUNDED ON THE APPLICATION OF A NON-GOVERNMENTAL ENTITY, AND THE COMMISSIONER'S INTERVENTION WAS PROMPTED BY THE FAILURE OF THE GOVERNMENTS TO CONSULT IN ADVANCE OF THE APPLICATION.

9. THE CASE OF THE ST. MARY'S ICE BOOM IS DISTINGUISHABLE IN A NUMBER OF IMPORTANT RESPECTS. IT INVOLVES GOVERNMENTAL WORKS CLEARLY WITHIN THE CONTEMPLATION OF ARTICLE III, PARAGRAPH 2. THERE HAS BEEN NO APPLICATION. MOREOVER, THE PARTIES HAVE CONSULTED AND HAVE CAREFULLY STUDIED THE POSSIBLE EFFECTS OF THE BOOM IN REACHING AGREEMENT THAT NO MATERIAL TRANS-BOUNDARY IMPACT IS INDICATED. THERE HAS BEEN NO UNILATERAL DETERMINATION OF "MATERIALITY" OF EFFECT IN THIS CASE.

10. IN FUTURE CASES WHERE GOVERNMENTAL WORKS ARE PROPOSED FOR THE BENEFIT OF COMMERCE AND NAVIGATION, I WOULD EXPECT THAT DECISIONS REGARDING THE NECESSITY OR DESIRABILITY OF SECURING THE APPROVAL OF THE COMMISSION WILL BE MADE ONLY AFTER NOTIFICATION AND, IF REQUESTED, ENSUING BILATERAL CONSULTATIONS.

THIS IS CONSISTENT WITH THE GENERAL SPIRIT OF
THE TREATY AND THE TRADITIONAL PRACTICE OF ADVANCE
NOTIFICATION AND CONSULTATION WHICH HAS BEEN DEVELOPED
BY THE TWO GOVERNMENTS. WHEREVER DOUBT OR DISAGREEMENT
EXISTS WITH RESPECT TO A PARTICULAR GOVERNMENTAL WORK
FOR THE BENEFIT OF COMMERCE AND NAVIGATION, I WOULD
EXPECT THE MATTER TO BE RESOLVED EITHER BY MAKING APPLICA-
TION TO THE COMMISSION UNDER ARTICLE III OR BY REFERRING
THE MATTER UNDER ARTICLE IX OF THE TREATY. OF COURSE,
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EITHER GOVERNMENT MAY CHOOSE TO MAKE APPLICATION FOR SUCH
A WORK, EVEN IN THE EVENT IT IS AGREED THAT THE INDICATED
TRANSBOUNDARY IMPACT IS IMMATERIAL (FOR EXAMPLE, DOCKET
100, 1975).

11. I UNDERSTAND THAT A LETTER SETTING OUT SIMILAR VIEWS
IS BEING SENT TO THE UNITED STATES SECTION OF THE
COMMISSION BY THE UNITED STATES DEPARTMENT OF STATE.
COMPLIMENTARY CLOSING. END TEXT.
ENDERS

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